

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2245

792

COLUMBIA LAUNDRY COMPANY, APPELLANT,

vs.

WILLIAM K. ELLIS

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED NOVEMBER 4, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

No. 2245.

COLUMBIA LAUNDRY COMPANY, BY CLARENCE F.
SOWERS, MANAGER, APPELLANT,

vs.

WILLIAM K. ELLIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2245.

COLUMBIA LAUNDRY COMPANY, Appellant,
vs.
WILLIAM K. ELLIS.

a Supreme Court of the District of Columbia.

Law. No. 52872.

WILLIAM K. ELLIS, Plaintiff,
vs.
COLUMBIA LAUNDRY COMPANY, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Affidavit.*

Filed Sep. 1, 1910.

In the Supreme Court of the District of Columbia.

No. 52872.

WILLIAM K. ELLIS, Plaintiff,
vs.
COLUMBIA LAUNDRY COMPANY, Defendant.

William K. Ellis being first duly sworn upon his oath says, that he is the plaintiff in the above styled cause and entitled to recover from the defendant Columbia Laundry Company possession of building and premises known as No. 735 on Ninth Street, N. W., in the City of Washington, District of Columbia, now occupied by the defendant, and the grounds upon which he claims possession thereof are as follows:

On the first day of October, A. D. 1907, affiant entered into a written contract with the defendant by Clarence F. Sowers, its manager, whereby affiant agreed to and did let said premises to the defendant as a tenant by the month, commencing on the first day of October, A. D. 1907. Copy of said contract is hereto attached and made a part of this affidavit. Defendant entered into possession and occupancy of said building and premises under said contract and continued to hold the same thereunder as the monthly tenant of plaintiff and not otherwise until the institution of this proceeding. That affiant was and is desirous of having possession of said house and premises and on the 20th day of June, 1910, served defendant with a thirty days' notice in writing in due and legal form to that effect, by leaving the same with Mrs. C. C. Barnitz, agent of the defendant and a person of proper age, on the said premises. Copy of said notice is hereto attached and made a part of this affidavit; that the defendant refused to vacate said building and premises and on the second day of August, 1910, affiant instituted a proceeding in the Municipal Court to recover possession thereof and on August 12th, 1910, judgment in affiant's favor for possession of said building and premises with costs of suit was given by said Court. Thereupon defendant appealed to this Court.

WILLIAM K. ELLIS.

Subscribed and sworn to before me this 1st day of September, A. D. 1910.

[SEAL.]

C. W. SIMPSON,
Notary Public.

DISTRICT OF COLUMBIA, ss:

R. E. L. Smith being first duly sworn says he served copy of within affidavit & two exhibits on Columbia Laundry Co. defendant on Sept. 1, 1910, by leaving said copy with the person in charge; that said person declined and refused to acknowledge receipt of said copy by signing acknowledgment indorsed hereon; that Mr. Diggs, Att'y for defendant was not in his office when affiant went there to serve the said copy on him on same date.

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R. E. L. SMITH.

Subscribed and sworn to before me this 1st day of September, 1910.

J. R. YOUNG, *Clerk,*
By FRED C. O'CONNELL,
Ass't Clerk.

Service of copy acknowledged this 1st day of September, A. D. 1910.

Agreement Between Landlord and Tenant.

Memorandum of an agreement between William K. Ellis and Columbia Laundry Company by Clarence F. Sowers, Manager, all

of the City of Washington, District of Columbia, whereby the said William K. Ellis has agreed to let and does hereby let, to the said Columbia Laundry Company by Clarence F. Sowers, Manager, No. 735 on 9th St. N. W., between G & H Sts. N. W., in said city, by the month commencing on the 1st day of October, A. D. 1907, at and for the monthly rent of Twenty-five and 00/100 (\$25.00/100), payable in full in advance; that is to say, on the first (1st) day of each and every month during which the said tenancy may continue, as rent in advance for the next ensuing month.

4 And the said Columbia Laundry Company by Clarence F. Sowers, Manager, has agreed to take, and does hereby take and hold the said premises as tenant by the month, at the said rent, payable as aforesaid; and that he will pay the water rent and gas bills as they become due, and that he will not sublet or assign the said premises, or carry on any business therein except that of a laundry office without the written consent of the said lessor, or use the same for any disorderly or unlawful purpose. And further that no gasoline will be kept or allowed on the premises unless by special permission in writing from the party of the first part.

Provided, always, that if the said Lessee shall fail to pay the said rent in full in advance as aforesaid, although there should have been no legal or formal demand for any rent whatever, or shall neglect to pay the water rent or gas bills at the time and on the day when the same shall fall due and be payable, as hereinbefore mentioned, or shall sublet or assign the said premises, or carry on any business therein except that of a laundry office, without the written consent as aforesaid; or shall use the same for any disorderly or unlawful purpose, or break either of the aforesaid covenants, then and in either of said events, this lease and all things herein contained, shall cease and determine, and shall operate as a Notice to Quit, the thirty days' notice to quit being hereby expressly waived. And the said Lessor his heirs and assigns, shall and may proceed to recover the possession of the said premises under the provisions of

5 the Code of Law for the District of Columbia, to regulate proceedings in cases between landlords and tenants, or by such legal process as may at the time be in operation in like case, but if no default occurs on the part of the said lessee, then he shall be entitled to not less than thirty days' notice to vacate the house and premises, which notice shall be given, in writing, at least thirty days before said tenancy is intended to terminate, and the owner or agent shall be entitled to the same notice from the lessee should he desire to vacate the aforesaid house and premises.

And it is further provided, that if, under the provisions of this Agreement default be made and a compromise or settlement shall be made thereupon, it shall not constitute a waiver of any covenant herein contained. And the said lessee hereby agree- to deliver the house in the same order in which it was received, usual wear and tear, fire and storm excepted; and it is hereby agreed that no waiver of one breach of any covenant herein contained shall be construed to waive or in any manner affect the covenants of this Agreement.

In testimony whereof, We have hereunto set our hands this 1st day of October, A. D. 1907.

WILLIAM K. ELLIS,
COLUMBIA LAUNDRY COMPANY,
By CLARENCE F. SOWERS, *Mgr.*

F. WALTER RYAN.

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WASHINGTON, D. C., *June 20th*, 1910.

To Columbia Laundry, by Clarence F. Sowers, Manager, 735 9th St. N. W.:

As I am desirous to have possession of the house and premises known as 735 on 9th Street between G and H N. W., in the City of Washington, District of Columbia and being part lot 8 in square 405 which you now hold of me as tenant, and which tenancy began on October 1st, 1907;

I hereby give you notice to remove and quit said premises at the expiration of 30 days from June 30th, 1910.

WILLIAM K. ELLIS.

Affidavit of Defense.

Filed Sep. 8, 1910.

* * * * *

Clarence F. Sowers, first being duly sworn upon oath, deposes and says that he is the person referred to in the above entitled cause, the correct title of the said cause being, William K. Ellis, Plaintiff, vs. Columbia Laundry Company by Clarence F. Sowers, Manager, defendant, as will appear by the record in the said cause and that the defendant in the above entitled cause has a valid and legal defense to the said cause of action, said defense being as follows:

7 The Columbia Laundry Company, the defendant in the above entitled cause was a corporation duly incorporated under the laws of the state of West Virginia and executed the lease referred to in the affidavit of merit filed in the above entitled cause but the said company became and was defunct prior to the first day of May, A. D. 1908, and that on or about the 28th day of May, A. D. 1908, the Columbia Laundry Company, Inc., was duly incorporated under the laws of the state of Virginia and that from the said date to the present time the said Columbia Laundry Company, Inc., became and was the tenant of the plaintiff, William K. Ellis, with respect to premises 735 Ninth Street, N. W., and that no time subsequent to the said 28th day of May, A. D. 1908, has the defendant, the Columbia Laundry Company by Clarence F. Sowers, Manager, as described in the declaration filed in this cause, been the tenant of the plaintiff; and that the Columbia Laundry Company, incorporated under the laws of West Virginia and the Colum-

bit Laundry Company, Inc., incorporated under the laws of Virginia, are two distinct and separate corporations and the officers and stockholders of the Columbia Laundry Company, Inc., are with a few exceptions different from those formerly similarly identified with the Columbia Laundry Company, incorporated under the laws of West Virginia.

CLARENCE F. SOWERS.

Subscribed and sworn to before me this 8th day of September, A. D. 1910.

[SEAL.]

WALLACE J. HILL,
Notary Public, District of Columbia.

8

Motion for Judgment.

Filed September 14, 1910.

* * * * *

Now comes the plaintiff by his attorneys and moves the Court for judgment against the defendant for possession of the premises claimed herein, on the ground that the defendant has failed to file a sufficient affidavit of defense.

MILLAN & SMITH,
Attorneys for Plaintiff.

Please take notice that we will call up the foregoing motion for hearing before the Justice holding the Circuit Court on Wednesday morning September 14, 1910, at ten o'clock or as soon thereafter as counsel can be heard.

MILLAN & SMITH,
Attorneys for Plaintiff.

To Mr. Chas. F. Diggs, Attorney for defendant.

Service of copy of foregoing motion and notice acknowledged this 8th day of September, A. D. 1910.

CHARLES F. DIGGS,
Attorney for Defendants.

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Supreme Court of the District of Columbia.

WEDNESDAY, September 14, 1910.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, whereupon, comes on for hearing plaintiff's motion filed herein this 14th day of September, 1910, "for judgment against

the defendant for possession of the premises claimed herein on the ground that the defendant has failed to file a sufficient affidavit of defense."

Upon consideration whereof, it is ordered that said motion be and the same is hereby granted.

Wherefore, it is considered that the plaintiff herein recover of defendant herein, possession of "the premises 735 9th St. N. W. located in the District of Columbia" and have execution thereof.

Further it appearing that the said plaintiff ought to have judgment in damages for arrears of rent, if any, that may be due the plaintiff, but the amount thereof being unknown to the Court, it is ordered that the same be ascertained by the inquest of a jury.

From the foregoing, the defendant by its Attorney in open Court notes an appeal to the Court of Appeals of the District of Columbia, whereupon the penalty of a bond to operate as a Supersedeas is hereby fixed in the sum of Five hundred dollars (\$500).

10 Further, upon motion of defendant by its Attorney, and for good cause shown, a stay of execution is hereby ordered herein to and including the 20th instant.

Memorandum.

September 20, 1910.—Appeal bond approved and filed.

Order for Preparation of Record.

Filed October 10, 1910.

* * * * *

The Clerk of said Court will please prepare the record in the above entitled cause for the Court of Appeals and include therein the following; affidavit of plaintiff with notice and agreement attached to and made part of same, filed Sept. 1, 1910; affidavit of defendant, filed Sept. 8, 1910; motion for judgment; judgment; appeal noted; memo. of bond.

CHARLES F. DIGGS,
Attorney for Defendant.

Agreed to.
MILLAN & SMITH,
Att'ys for Plaintiff.

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 10, both inclusive, to be a true and correct transcript of the

record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52,872, At Law, wherein William K. Ellis, is Plaintiff, and Columbia Laundry Company, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 29th day of October, A. D. 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2245. Columbia Laundry Company, appellant, vs. William K. Ellis. Court of Appeals, District of Columbia. Filed Nov. 4, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

In the Court of Appeals of the District of Columbia

Henry W. Hodges.
Blank.

No. 2245

COLUMBIA LAUNDRY COMPANY. Appellant,

VS.

WILLIAM K. ELLIS. Appellee.

BRIEF FOR APPELLANT

CHARLES F. DIGGS,

Attorney for Appellant.

In the Court of Appeals of the District of Columbia

COLUMBIA LAUNDRY COMPANY,
Appellant,

vs.

WILLIAM K. ELLIS,
Appellee.

} No. 2245.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

This is a landlord and tenant proceeding instituted by the appellee for the purpose of recovering possession of premises 735 Ninth Street, N. W., in the city of Washington, District of Columbia, and the cause comes on to be heard in this Court upon an appeal by the appellant from a judgment of the Supreme Court of the District of Columbia.

The single question to be determined by this Court is, whether or not the appellant's affidavit of defense, which is set forth at pages 4 and 5 of the record, is sufficient in law.

The affidavit reads as follows :

"Clarence F. Sowers, first being duly sworn upon oath, deposes and says that he is the person referred to in the above entitled cause, the correct title of the said cause being, William K. Ellis, Plaintiff, *vs.* Columbia Laundry Company by Clarence F. Sowers, Manager, defendant, as will appear by the record in the said cause and that the defendant in the above entitled cause has a valid and legal defense to the said cause of action, said defense being as follows:

"The Columbia Laundry Company, the defendant in the above entitled cause was a corporation duly incorporated under the laws of the State of West Virginia and executed the lease referred to in the affidavit of merit filed in the above entitled cause but the said company became and was defunct prior to the first day of May, A. D. 1908, and that on or about the 28th day of May, A. D. 1908, the Columbia Laundry Company, Inc., was duly incorporated under the laws of the State of Virginia and that from the said date to the present time the said Columbia Laundry Company, Inc., became and was the tenant of the plaintiff, William K. Ellis, with respect to premises 735 Ninth Street, N. W., and that no time subsequent to the said 28th day of May, A. D. 1908, has the defendants, the Columbia Laundry Company by Clarence F. Sowers, Manager, as described in the declaration filed in this cause, been the tenant of the plaintiff; and that the Columbia Laundry Company, incorporated under the laws of West Virginia and the Columbia Laundry Company, Inc., incorporated under the laws of Virginia, are two distinct and separate corporations and the officers and stockholders of the Columbia Laundry Company,

Inc., are with a few exceptions different from those formerly similarly identified with the Columbia Laundry Company, incorporated under the laws of West Virginia.

CLARENCE F. SOWERS.

"Subscribed and sworn to before me this 8th day of September, A. D. 1910.

WALLACE J. HILL.,

[SEAL.] *Notary Public, District of Columbia."*

Argument.

As will be seen by the record, the Appellee relies upon a lease executed by the Columbia Laundry Company, a corporation organized under the laws of the State of West Virginia, and the affidavit of defense admits the execution of this lease, but avers that the company named therein became defunct some time prior to May, 1908, and that an entirely new company, composed of different officers and stockholders, was incorporated under the laws of the State of Virginia, which company bears the name Columbia Laundry Company, Inc. The affidavit further avers that, in May, 1908, the latter company became, and has since been, the tenant of the appellee, and that at no time, subsequent to said date, has the appellant been the tenant of the appellee.

In effect, the affidavit of defense states that in May, 1908, the defendant ceased to be the tenant of the plaintiff, and that on that date, another corporation, in no way connected with the defendant, became the tenant of the plaintiff.

By the judgment of the court below, the appellant is compelled to restore to the appellee the possession of premises it is not in possession of, and which are occupied

by another corporation, who holds them as the tenant of the appellee.

It is submitted that the appellant's affidavit sets forth a complete defense to the appellee's cause of action and that the judgment of the lower court should be reversed.

Respectfully submitted,

CHARLES F. DIGGS,
Attorney for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC. 19. 1910

Henry W. Rodgers
Chas.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2245.

COLUMBIA LAUNDRY COMPANY, APPELLANT,

vs.

WILLIAM K. ELLIS, APPELLEE.

BRIEF FOR APPELLEE.

MILLAN & SMITH,

Attorneys for Appellee.

IN THE
Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2245.

COLUMBIA LAUNDRY COMPANY, APPELLANT,

vs.

WILLIAM K. ELLIS, APPELLEE.

BRIEF FOR APPELLEE.

Statement.

This action originated in the municipal court to recover possession of premises No. 735 Ninth street northwest from the appellant. Judgment was in appellee's favor, and the appellant appealed to the Supreme Court of the District of Columbia. After the case had been docketed there, appellee filed his affidavit (Rec., p. 1) under rule 19 of the common-law rules of said court. Appellant thereupon filed its affi-

davit of defense (Rec., p. 4) and motion was made by appellee for judgment for possession of the premises, which said motion was granted (Rec., p. 6). Appellant then appealed to this court.

The sole question raised by the brief of the appellant is as to the sufficiency of its affidavit of defense.

ARGUMENT.

The 19th rule of the Supreme Court of the District of Columbia is as follows:

“SEC. 1. Within ten days after the docketing of an
 “ appeal from a judgment of the municipal court in
 “ a landlord and tenant proceeding and the service
 “ of the summons upon the appellee or the entering
 “ of his appearance in the cause, the plaintiff or his
 “ agent may file an affidavit setting out the grounds
 “ upon which he claims possession of the premises
 “ described in the complaint. A copy of such affi-
 “ davit shall be served upon the defendant or his
 “ attorney of record and the plaintiff shall be en-
 “ titled to a judgment against the defendant for pos-
 “ session of the property described in the complaint
 “ and costs unless the defendant shall within ten days
 “ after service of copy of said affidavit file an affidavit
 “ of defense denying the right of the plaintiff to the
 “ possession of the property in question and spe-
 “ cifically stating in precise and distinct terms the
 “ grounds of his defense, which must be such as
 “ would, if true, be sufficient to defeat plaintiff’s
 “ recovery.

“SEC. 2. The plaintiff or his agent may also in said
 “ affidavit set out distinctly his claim for such ar-
 “ rears of rent, if any, as was claimed before the mu-
 “ nicipal court, and for intervening damages to the
 “ leased property and compensation for the use and
 “ occupation thereof from the date of the judgment
 “ appealed from to the date of the judgment of the
 “ Circuit Court, and he shall be entitled to a judg-

“ment against the defendant for the amount or
 “amounts so claimed, together with the intervening
 “damages, accrued from the date of the filing of said
 “affidavit to the day of the entry of judgment, un-
 “less the defendant shall in his affidavit of defense
 “specifically state in precise and distinct terms the
 “ground of his defense thereto, which must be such
 “as would, if true, be sufficient to defeat plaintiff’s
 “claim in whole or in part. If the affidavit of the
 “defendant denies only a part of plaintiff’s claim,
 “the plaintiff may elect to take judgment for the
 “part not denied by the defendant’s affidavit.

“SEC. 3. When the defendant is a corporation, the
 “affidavit of defense may be made by its officer,
 “agent, or attorney.”

This rule is in spirit like Common Law Rule 73, and is designed to prevent fraud by tenants holding over through the delay incident to appeals, after adverse judgment in the Municipal Court and where the tenant has no meritorious defense. It was born in the abuse of the right of appeal from judgments of the Municipal Court in landlord and tenant cases. Like the 73d rule it contemplates that *facts*, not conclusions of law, should be stated as the grounds of defense.

The Affidavit of the Appellant States Conclusions of Law.

Appellant alleges that the defendant company was a corporation, incorporated under the laws of West Virginia, “but the said company became and was defunct prior to the first day of May, 1908;” and that at no time “subsequent to the twenty-eighth day of May, A. D. 1908, has the defendant, the Columbia Laundry Company, been the tenant of appellee.”

A plea that a corporation was dissolved and ceased to have any existence as a corporation is bad as stating a conclusion of law.

Brown vs. Delafield & Baxter Co., 1 App. D. C., 232.

Appellant's next allegation is that "on or about the 28th day of May, A. D. 1908, the Columbia Laundry Company, Inc., was duly incorporated under the laws of the State of Virginia, and that from the said date, to the present time the said Columbia Laundry Company, Inc., became and was the tenant of the plaintiff, William K. Ellis, with respect to premises, 735 Ninth street northwest." This statement is immaterial, nor does it follow that because Columbia Laundry Company, Inc., became and was plaintiff's tenant, that Columbia Laundry Company ceased to be plaintiff's tenant.

Tenancy is a question of law; *occupancy* is the question of fact.

Appellant's next allegation is "that no time subsequent to the said 28th day of May, has the defendant, the Columbia Laundry Company, by Clarence F. Sowers, manager, as described in the declaration filed in this cause, been the tenant of the plaintiff."

Again, we submit, tenancy is a question of law. Appellant is attempting to answer appellee's affidavit. It says that, "Columbia Laundry Company, *by Clarence F. Sowers, manager,*" has at "no time subsequent to the said 28th day of May, A. D. 1908," been plaintiff's tenant. Appellee has not claimed that said company by said Sowers is its tenant. Its action is against appellant, Columbia Laundry Company, and it is immaterial whether its occupancy is through the instrumentality of Sowers, as its manager, or otherwise.

Under the 73d rule, heretofore referred to, it has been held that the affidavit must contain a brief and comprehensive statements of *facts*, which would be sufficient, in law, if proved, to constitute a valid defense to the action.

Cropley *vs.* Vogeler, 2 App. D. C., 28.

It is intimated by appellant's affidavit that appellant ceased business and was succeeded in the occupancy of the building by Columbia Laundry Company, Inc., but occupancy is not necessary to the relation of tenant. If appellant is no longer

in the legal relation of tenant to appellee, how did that relationship cease—what assembly of facts terminated it? These things should be averred, and not the bare assertion that the tenancy ended.

Manifestly it is within the power of appellant to state the facts upon which it relies as a defense to this action in simple and direct language, but it does not do so. It asks the court to assume that its becoming "defunct" prior to May 1, 1908, and the incorporation of another company on May 28, 1908, terminated its tenancy. It asks the court to assume that because the Columbia Laundry Company, Inc., "became and was the tenant of plaintiff" (a conclusion of law) that *its* tenancy ceased. It does not allege that appellee was notified of its demise; or that the succeeding corporation ever announced its birth to appellee, or ever paid rent to appellee, or did anything to put appellee upon notice that appellant had died and another corporation arisen from its ashes. Appellant's affidavit is ingenious to the extreme, but it lacks the elements of facts to make it a sufficient answer to the affidavit of appellee.

We beg to submit a hypothetical case as an illustration of appellant's defense and the wrong it could work if established in law. A corporation known as the Columbia Laundry Company enters into a lease with an owner of property. It continues for many months, and then without any notice to its landlord succeeds itself under another charter, with a title changed only by the addition of the letters "Inc." The officers and stockholders of the two companies are to some extent the same individuals, and so far as is known to the public, the plant of the two corporations is identical. No new contract of lease is made with the owner of the building by the substitute corporation, but it steps into the place and business of the old one without making so much as a ripple upon the surface of affairs. It presents an exception to the maxim that two things cannot occupy the same space at the same time. Columbia Laundry

Company continues to deal with its landlord and its substituted self remains in concealment. A time comes when the landlord desires his property and institutes proceedings under his contract to recover it. Thereupon, the Columbia Laundry Company says that it is dead, hence it is no longer in possession; it is now the Columbia Laundry Company, Inc., and its self is not its self, for which reason the landlord is helpless.

We submit that appellant's position is without merit in law, and the judgment of the court below should be affirmed.

MILLAN & SMITH,
Attorneys for Appellee.

